IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

FILED
SEP 08 2016
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY ______ DEPUTY

BRAD RILEY, on behalf of himself and all others similarly situated, *Plaintiffs*,	§	
	§	
	§	
v.	§	**NO. MO:16-CV-00064-RAJ-DC**
	§	
FRANK'S INTERNATIONAL, LLC, *Defendant.*	§	
	§	

ORDER GRANTING PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION

BEFORE THE COURT is Plaintiff Brad Riley's ("Plaintiff") Motion for Conditional Certification. (Doc. 15). After due consideration of the pleadings and the relevant law, Plaintiff's Motion for Conditional Certification shall be **GRANTED**. (Doc. 15).

I. BACKGROUND

Plaintiff brings this action both individually and on behalf of all others similarly situated against Defendant Frank's International, LLC ("Defendant"), asserting violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.* (Doc. 1). Plaintiff alleges Defendant provides "casing delivery and installation services to Defendant's customers in the oil and gas industry." (*Id.* at 3). Plaintiff claims Defendant "required and/or permitted Brad Riley and other similarly situated employees to work in excess of forty hours per week at their facilities but failed to compensate them at the correct rate of overtime pay required by law." (*Id.* at 1). Plaintiff alleges Defendant willfully committed violations of the FLSA by failing to compensate Plaintiff and other similarly situated non-exempt workers for their overtime work and time-and-one-half their regular rate of pay. (*Id.*). Accordingly, Plaintiff seeks to recover unpaid overtime wages for all hours worked in excess of forty hours in a workweek, liquidated damages, attorney's fees, and costs. (*Id.* at 5).

On July 8, 2016, Plaintiff filed a motion seeking conditional certification of this lawsuit as a collective action under the FLSA. (Doc. 15). Plaintiff asserts there are other similarly situated individuals whose rights under the FLSA have been violated by Defendant and requests that those individuals be permitted to opt-in to this action. (*Id.*). On July 22, 2016, Defendant filed its Response in Opposition to Plaintiff's Motion for Conditional Certification. (Doc. 18). On July 29, 2016, Plaintiff filed his Reply. (Doc. 19). This matter is now ripe for disposition.

II. LEGAL STANDARD

An employee may bring an action for violating the minimum wage and overtime provisions of the FLSA either individually or as a collective action on behalf of himself and "other employees similarly situated." 29 U.S.C. § 216(b). Unlike a class action filed under Federal Rule of Civil Procedure 23(c), a collective action under Section 216(b) provides for a procedure to "opt-in," rather than "opt-out." *Roussell v. Brinker Int'l, Inc.*, 441 F. App'x 222, 225 (5th Cir. 2011) (unpublished) (citing *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 916 (5th Cir. 2008)). Although the United States Court of Appeals for the Fifth Circuit has declined to adopt a specific test to determine when a court should conditionally certify a class or grant notice in a case brought under the FLSA, the majority of courts within the Fifth Circuit have adopted the *Lusardi* two-stage approach, after *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987).[1]

The two stages of the *Lusardi* approach are the "notice stage" and the "decertification stage." *See Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1216 (5th Cir. 1995), overruled on other grounds by *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). At the notice stage, the

[1] *See, e.g., Vanzzini v. Action Meat Distribs., Inc.*, 995 F. Supp. 2d 703, 719 (S.D. Tex. 2014) (applying *Lusardi*); *Mateos v. Select Energy Servs., LLC*, 977 F. Supp. 2d 640, 643 (W.D. Tex. 2013) (same); *Tice v. AOC Senior Home Health Corp.*, 826 F. Supp. 2d 990, 994 (E.D. Tex. 2011) (same); *Marshall v. Eyemasters of Tex., Ltd.*, 272 F.R.D. 447, 449 (N.D. Tex. 2011) (same).

district court "determines whether the putative class members' claims are sufficiently similar to merit sending notice of the action to possible members of the class." *Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 519 (5th Cir. 2010). "Because the court has minimal evidence, this determination is made using a fairly lenient standard, and typically results in 'conditional certification' of a representative class." *Mooney*, 54 F.3d at 1214. If the court finds that the putative class members are similarly situated, then conditional certification is warranted and the plaintiff will be given the opportunity to send notice to potential class members. *Id.* After the class members have opted in and discovery is complete, the defendant may then file a decertification motion—the second stage of the *Lusardi* approach—asking the court to reassess whether the class members are similarly situated. *Id.* At that point, the court will fully evaluate the merits of the class certification. *Id.*

III. Discussion

Plaintiff seeks to certify a class consisting of "[a]ll persons employed by Defendant at any time during the last three years who were assigned to Defendant's Case Running Tools division and who were paid on an hourly, day rate, and/or piece rate (i.e, casing footage pay) basis, and who received payments for 'auto expense.'" (Doc. 15 at 12). The Court's analysis here need only address the first stage of the *Lusardi* inquiry. Plaintiff must show that "(1) there is a reasonable basis for crediting the assertion that aggrieved individuals exist; (2) those aggrieved individuals are similarly situated to the plaintiff in relevant respects given the claims and defenses asserted; and (3) those individuals want to opt in to the lawsuit." *Tolentino v. C & J Spec–Rent Servs., Inc.*, 716 F. Supp. 2d 642, 647 (S.D. Tex. 2010).

During the notice stage, the court makes its decision "usually based only on the pleadings and any affidavits which have been submitted[.]" *Id.* Courts "appear to require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan infected by discrimination." *Mooney*, 54 F.3d at 1214 n. 8. "FLSA collective actions are generally favored because such actions reduce litigation costs for the individual plaintiffs and create judicial efficiency by resolving in one proceeding common issues of law and fact arising from the same alleged activity." *Tolentino*, 716 F. Supp. 2d at 646.

A. Existence of Aggrieved Co-Workers

In the Complaint, Plaintiff alleges he "and other similarly situated employees are FLSA non-exempt workers who have been denied properly calculated overtime pay required by law, for which they now seek recover." (Doc. 1 at 1). Five opt-in plaintiffs filed their consents to join this collective action at the time of the filing of the Complaint and two additional opt-in plaintiffs have subsequently joined this collective action. (Docs. 1-2, 1-3, 1-4, 1-5, 1-6, 8-1, 14-1). Plaintiff submits the declarations of Brad Riley, Brian Lindsey, and Cason Lindsey in support of the Motion for Conditional Certification. (Docs. 15-1, 15-2, 15-3).

In his declaration, Plaintiff states that he is currently an employee of Frank's International, LLC. (Doc. 15-1 at 1). Plaintiff was employed by Defendant for approximately nine months beginning in May 2007, and then he was returned to work on April 29, 2013. (*Id.*). Plaintiff explains that Defendant provides casing delivery and installation services to its customers' drilling rigs in Texas and New Mexico. (*Id.*). Since April 29, 2013, until the present, Plaintiff has "been paid an hourly rate" by Defendant. (*Id.*). Plaintiff was paid $27.00 and $26.50 per hour as a CRT Tech. (*Id.*). In addition, he received "AUTO Expense" payments, for which no overtime premium was paid. (*Id.*). In 2015, Plaintiff states he was "paid at least $48,238.75" for "AUTO Expense." (*Id.*). Plaintiff claims the "AUTO Expense" compensation did not reasonably approximate the actual cost of the expenses he incurred driving his pickup or a company pickup for Defendant. (*Id.*). Plaintiff alleges that the "actual cost was much less when I drove my pickup, and [I] did not incur any expense at all when I drove a company pickup." (*Id.*). Further, Plaintiff states that the "payments did not correspond to the actual mileage driven." (*Id.*). According to Plaintiff, Defendant never kept or asked for his mileage and did not use the amount of miles driven by him to calculate the "AUTO Expense" payments. (*Id.*).

Next, Plaintiff states he "frequently worked in excess of 40 hours per week." (*Id.*). Plaintiff claims that when he worked overtime, the "AUTO Expense" payments were not included in his regular rate used to calculate his overtime pay. (*Id.*). In addition, his overtime rate did not include the "AUTO Expense" payments. (*Id.*). Plaintiff alleges that as an employee of Defendant, he "spent long hours working with other employees in the Case Running Tools division, including other CRT Techs and employees in various other positions." (*Id.* at 3). Plaintiff claims he and other similarly situated employees spoke about the way in which Defendant paid its employees. (*Id.*). Thus, Plaintiff concludes that he has personal knowledge based on his work history and relationships with his co-workers that they also routinely worked in excess of 40 hours per week. (*Id.*). In addition, Plaintiff knew that other employees "were similarly promised and received extra pay in the form of 'AUTO expense' payments which were not included in their regular rate of pay for determining their overtime compensation." (*Id.*).

The Court finds that Plaintiff is familiar with Defendant's compensation policies as a rèsult of his former employment and interactions with other employees. The pleadings in this case allege that Defendant implemented the same policy of underpayment with respect to many of its employees. Because Plaintiff has personal knowledge of Defendant's payment scheme, the Court concludes that this evidence is sufficient to credit "the assertion that aggrieved individuals exist," as well as the allegations that Defendant failed to appropriately compensate Plaintiff and similarly situated employees as required by the FLSA. *Tolentino*, 716 F. Supp. 2d at 647.

B. Aggrieved Co-Workers Are Similarly Situated to Plaintiff

To prevail on the motion for conditional certification, Plaintiff must also show that he is similarly situated to the class members he seeks to represent. "[P]otential class plaintiffs are considered 'similarly situated' to the named plaintiffs if they are 'similarly situated' with respect to their job requirements and with regard to their pay provisions." *Tolentino*, 716 F. Supp. 2d at 649–50. "The positions need not be identical, but similar." *Id.*

Plaintiff works as a CRT Tech, which requires him "to engage in manual labor involving running casing and loading tools." (Doc 15-1 at 1). As a CRT Tech, Plaintiff does "basic manual labor on and around the rigs" of Defendant's customers. (*Id.* at 2). Specifically, Plaintiff runs a CRT machine rigs up and rigs down, and monitors the rig. (*Id.*). Plaintiff admits that the job titles of the opt-in plaintiffs vary. (Doc. 15 at 7). However, Plaintiff claims that all opt-in plaintiffs engaged in manual tasks relevant to Defendant's Case Running Tool operations. (*Id.*).

In his declaration, Brian Lindsey states he has been employed by Defendant as a Crew Hauler and a CRT Tech, which requires him to engage in manual labor involving hauling employees and equipment, running casing and loading tools. (Doc. 15-2 at 2). As a Crew Hauler, Brian Lindsey loaded and drove tools and equipment and Defendant's employees to customers' rigs. (*Id.*). As a CRT Tech, Brian Lindsey would do basic manual labor on and around the rigs of Defendant's customers. (*Id.*). In addition, Brian Lindsey runs a CRT machine, rigs up and rigs down, monitors the rig. (*Id.*). Cason Lindsey states he has also been employed by Defendant as a CRT Tech, which required him to engage in manual labor involving running casing and loading tools. (Doc. 15-3 at 1). As a CRT Tech, Cason Lindsey does basic manual labor on and around the rigs of Defendant's customers, including running a CRT machine, rigging up and rigging down, and monitoring the rig. (*Id.* at 1–2).

The Court finds that the differences in the job descriptions among the potential opt-in plaintiffs do not preclude class certification. Plaintiff has articulated a uniform compensation scheme by alleging Defendant failed to pay employees in Case Running Tools positions overtime premiums at a rate of one and one-half their respective regular rates of pay for all hours worked over 40 hours per workweek because Defendant did not include "AUTO Expense" payments or truck incentive bonuses in the putative class members' regular rates of pay when calculating the overtime premium owed. (Doc. 15 at 2). Thus, Plaintiff shares common pay provisions and common manual job duties with the potential opt-in plaintiffs. (*Id.*).

The Court rejects Defendant's argument that individualized liability issues make representative adjudication improper. Defendant contends that the Court must determine whether the "AUTO Expense" payment was a reimbursement and properly excludable from the regular rate on a case-by-case basis. (Doc. 18 at 5). The Court is not convinced that this individualized inquiry makes collective adjudication of this case unworkable. Accordingly, the Court concludes that Plaintiff has raised substantial allegations to bind himself to the putative class members as victims of the same "decision, policy, or plan infected by discrimination." *Mooney*, 54 F.3d at 1214 n. 8.

Defendant next contends that Plaintiff's allegations do not support a company-wide notice because they address its Midland/Odessa location. (Doc. 18 at 5). Plaintiff counters that Plaintiff and opt-in plaintiffs Brian Lindsey and Cason Lindsey were dispatched out of Defendant's Midland/Odessa office, but did work in New Mexico as well. (Doc. 19 at 3). Plaintiff previously offered to stipulate that the proposed class would be limited to Defendant's

Midland/Odessa office and other New Mexico offices where the auto expense pay policy was in place. (*Id.*).

"FLSA violations at one of a company's multiple locations generally are not, without more, sufficient to support company-wide notice." *Rueda v. Tecon Servs., Inc.*, No. CIV. A. H–10–4937, 2011 WL 2566072, at *4–6 (S.D. Tex. June 28, 2011). However, "geographic commonality is not necessary to satisfy the FLSA collective action's 'similarly situated' requirement," so long as the employees were impacted by a common policy. *Vargas v. Richardson Trident Co.*, No. H–09–1674, 2010 WL 730155, at *8 (S.D. Tex. Feb. 22, 2010) (internal quotation marks omitted). Accordingly, "[i]f there is reasonable basis to conclude that the same policy applies to multiple locations of a single company, certification is appropriate." *Rueda*, 2011 WL 2566072, at *4.

Plaintiff offers affidavits from three employees, including himself, in support of certification. (Docs. 15-1, 15-2, 15-3). Three affidavits attesting to identical compensation schemes at the Midland/Odessa facility from employees who also worked "in New Mexico and were aware of Defendant's pay practices through their experience working long hours with other employees," is sufficient evidence for conditional certification of employees who were dispatched from the Midland/Odessa facility as well as facilities in New Mexico where the auto expense pay policy was in place. Accordingly, the class of similarly situated individuals is limited to employees in Case Running Tools positions dispatched out of Defendant's Midland/Odessa or New Mexico facilities.

Finally, the Court agrees with Defendant that the class should be limited to workers employed three years from the date the notice is approved. Courts within the Fifth Circuit have repeatedly recognized that "based on the statute of limitations . . . class certification is appropriately limited to workers employed by the defendant up to three years before notice is approved by the court." *Tolentino*, 716 F. Supp. 2d at 654 (quoting *Quintanilla v. A & R Demolition, Inc.*, No. H–04–1965, 2005 WL 2095104, at *16 (S.D. Tex. Aug. 30, 2005)); *see also Watson v. Travis Software Corp.*, No. H–07–4104, 2008 WL 5068806, at *9 (S.D. Tex. Nov. 21, 2008) ("A class period covering the three years before the date this court approves conditional certification and notice is appropriate in this case."). As such, the three-year limitations period under the FLSA should be measured from the date notice is issued. Because the date of approval of notice is determinative for purposes of establishing a class period, the Court finds that the following definition of the collective action should henceforth be employed:

> **All current and former employees of Frank's International, LLC assigned to Case Running Tools positions dispatched out of Midland/Odessa, Texas or New Mexico who received payments for "auto expense" during the three-year period before the date the Court authorizes notice.**

C. Aggrieved Co-Workers' Desire to Opt In

Finally, Plaintiff has made a sufficient showing that other workers want to opt-in to the instant action. Five opt-in plaintiffs filed their consents to join this collective action at the time of the filing of the Complaint and two additional opt-in plaintiffs have subsequently joined this collective action. (Docs. 1-2, 1-3, 1-4, 1-5, 1-6, 8-1, 14-1). Considering the lenient standard at this stage, conditional certification of a collective action is appropriate. *Tolentino*, 716 F. Supp. 2d at 653.

D. Plaintiff's Proposed Notice

Plaintiff has also requested the Court to approve his proposed notice and consent forms. (Doc. 15). A court has discretion regarding the form and content of the notice to ensure that potential plaintiffs receive accurate and timely information about the pending collective action. *Hoffmann–La Roche v. Sperling*, 493 U.S. 165, 169–70 (1989). Generally, a plaintiff should be allowed to use his preferred language in drafting the notice absent reasonable objections. *Reyes v. Quality Logging, Inc.*, 52 F. Supp. 3d 849, 852 (S.D. Tex. 2014) (citations omitted). However, a court also has a duty to ensure that the notice does not appear to endorse the merits of the underlying claim. *Hoffmann–La Roche*, 493 U.S. at 174.

1. Personal Information

Defendant objects to providing Plaintiff with potential opt-in plaintiffs' telephone numbers and other personal information, such as emails, dates of birth, dates of employment and Social Security numbers, based on privacy interests. (Doc. 18 at 8). The Court finds that Defendant's privacy concerns can be dealt with through a protective order limiting the use and disclosure of this information. Thus, the Court will enter a standard protective order allowing the Parties to keep personnel-related records confidential and limit their usage to this litigation.

The Court agrees with Plaintiff and other courts that sending of notice in FLSA proceedings via email is an appropriate method of distribution. *See Pacheco v. Aldeeb*, No. 5:14-CV-121-DAE, 2015 WL 1509570, at *8–9 (W.D. Tex. Mar. 31, 2015) (unpublished) (approving notice by email). Thus, Plaintiff shall be permitted to distribute the revised Notice by email in addition to U.S. mail. Accordingly, the Court orders Defendant to produce the email addresses of all potential opt-in plaintiffs who meet the revised class definition. Furthermore, the Court orders Defendant to disclose the telephone numbers of putative class members to Plaintiff. *Bonner v. SFO Shuttle Bus Co.*, 2013 WL 6139758, at *5 (N.D. Cal. Nov. 21, 2013) (granting plaintiffs' motion for conditional certification and ordering defendant to produce Microsoft Excel file containing names, mailing addresses, email addresses, and phone numbers of all prospective members of class). However, telephone numbers shall be used only to verify addresses or e-mail addresses for potential opt-in plaintiffs. In addition, Defendant shall provide

Plaintiff with the dates of employment of each potential opt-in plaintiff as such information is highly relevant to this case.

Lastly, Plaintiff has not demonstrated any need for additional personal information of putative opt-in plaintiffs beyond contact information at this stage of the case. The Court finds compelled disclosure of social security numbers and dates of birth inappropriate based on the privacy concerns of the potential class members. *See Nguyen v. Versacom, LLC*, No. 3:13-CV-4689-D, 2015 WL 1400564 (N.D. Tex. Mar. 27, 2014) (unpublished) (concluding that the need for compelled disclosure of prospective class members' "social security numbers is outweighed by their privacy interests"). As such, Plaintiff's request for additional personal information, including social security numbers and dates of birth, shall be denied.

2. Judicial Endorsement

Defendant also objects to Plaintiff's request to place an additional notice on the envelope as creating the appearance of judicial endorsement. (Doc. 18 at 9). The underlying concern associated with unwarranted solicitation is the stirring up of frivolous litigation through the court-facilitated notice. *Valcho v. Dallas Cnty. Hosp. Dist.*, 574 F. Supp. 2d 618, 622 (N.D. Tex. 2008). Specifically, Plaintiff proposes the inclusion of the statement "Notice of Unpaid Overtime Lawsuit—Deadline to Join" on the return envelope included with the Notice and Consent to Join.

Notably, Plaintiff does not seek to use the Court's name on the return envelope nor does the language at issue give the impression that the Court supports Plaintiff's lawsuit. The Court has reviewed Plaintiff's proposed Notice and return envelope and does not perceive any judicial endorsement concerns. Importantly, the proposed Notice states that the "Court has not decided who is right in this lawsuit." (Doc. 15-4). As such, the proposed Notice clearly communicates that the Court has expressed no opinion regarding the merits of the case. In addition, the proposed Notice states that if "the Court finds in your favor, you may receive additional wages and other money damages, but if the Court does not find in your favor, you will receive nothing." (*Id.*). Accordingly, the Court overrules Defendant's objection based on any perceived judicial sponsorship concerns. As noted above, absent reasonable objections, Plaintiff should be allowed to use his preferred language.

3. Reminder Notice

Plaintiff requests that this Court permit Plaintiff to distribute a reminder postcard regarding the Notice to putative class members. However, the Court does not believe a reminder is necessary or appropriate to effectuate notice during the sixty-day period. *See Santinac v. Worldwide Labor Support of Ill., Inc.*, 107 F. Supp. 3d 610, 619 (S.D. Miss. 2015) (denying plaintiff's request to send a reminder notice in FLSA action). Accordingly, Plaintiff's request to disseminate reminder notices shall be denied.

4. Alternate Counsel

Defendant contends that Plaintiff's notice improperly only directs opt-in plaintiffs to his counsel without informing the putative class members that they may contact an attorney of their choosing. The Court agrees with Defendant and finds that the proposed Notice must advise putative class members of their right to retain separate counsel and pursue their rights independently from the class. Therefore, Plaintiff must file a Revised Proposed Notice including language advising putative class members of their right to separate representation by an attorney of their choosing.

5. Potential Costs

Finally, Defendant argues the notice should inform opt-in plaintiffs that they may be required to pay costs if Defendant prevails in this litigation. The Court finds that the following language should be added to the Revised Proposed Notice to sufficiently put any potential opt-in plaintiffs on notice of their duties to participate in this litigation: "If judgment is rendered in favor of Frank's International, LLC, the Court may tax certain statutory costs against the unsuccessful workers."

IV. Conclusion

For the foregoing reasons, the Court **GRANTS** Plaintiff's Motion for Conditional Certification. (Doc. 15).

It is therefore **ORDERED** that Plaintiff shall within **three (3) business days** of this Order file with the Court a Revised Proposed Notice that complies with this Order.

It is further **ORDERED** that Defendant shall within **twenty-one (21) days** of this Order, provide Plaintiff's counsel with the names, last known addresses, e-mail addresses, and telephone numbers of the potential opt-in plaintiffs ("Court-Ordered Information"), in a usable electronic format. Telephone numbers shall be used only to verify addresses or e-mail addresses for potential opt-in plaintiffs, and shall not be used to solicit.

It is further **ORDERED** that Plaintiff's counsel shall, upon obtaining the Court-Ordered Information, be permitted to send notices of this action in the form set forth in Plaintiff's Revised Proposed Notice, by mail and email, for a period of **sixty (60) days** from the date Defendant provides Plaintiff with the Court-Ordered Information.

It is further **ORDERED** that Plaintiff's counsel shall file an advisory of any sending of such notices with this Court within **three (3) business days** of doing so. In such advisories, Plaintiff's counsel shall specify the date and manner by which the notices were sent.

It is further **ORDERED** that the notice shall inform all potential opt-in plaintiffs that they shall have until **sixty (60) days** from the date Defendant provides Plaintiff with the Court-Ordered Information to deposit in the mail or email their Notices of Consent to Join to counsel for Plaintiff.

It is finally **ORDERED** that Plaintiff's counsel shall have until **fifteen (15) days** after the expiration of the sixty-day notice period (which ends **sixty (60) days** from the date Defendant provides Plaintiff's counsel with the Court-Ordered Information) to file the Notices of Consent to Join of all opt-in plaintiffs received.

It is so **ORDERED**.

SIGNED this 8th day of September 2016.

ROBERT A. JUNELL
Senior United States District Judge